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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 309

JOSEPH L. TRAVERS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Joseph L. Travers, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on June 3, 1966.

Citation To Opinion Below

The opinion of the Court of Appeals for the First Circuit is reported in — F.2d —, and is printed in Appendix A hereof.

Jurisdiction

The judgment of the Court of Appeals was entered on June 3, 1966. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254 (1).

Questions Presented

1. Did the Court of Appeals err in affirming a judgment of conviction rendered on an indictment which was based in part on a statute held by the Court of Appeals to be purely civil in nature?

2. Did the Court of Appeals err in affirming a judgment of conviction rendered on an indictment which was based in part on a statute held by the Court of Appeals to be purely civil in nature, but which statute makes evidence of any payment by a subcontractor to an [employee] of a prime contractor the basis for a conclusive presumption that the cost of such a payment was ultimately borne by the United States?

Statutes Involved

Title 41, United States Code, Section 51 provides in part as follows:

> "The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a *negotiated* contract entered into by any department, agency, or establishment of the United States for the furnishing

of supplies, materials, equipment or services of any kind whatsoever, or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or award *previously* awarded, is prohibited . . . The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. *Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. . .*" (Emphasis supplied).

Title 41, United States Code, Section 54 provides as follows:

"Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years or both."

Statement of Facts

The appellant, Joseph L. Travers, was indicted for violation of Title 41, United States Code, Sections 51-54. (RA. 4a) The appellant seasonably moved to dismiss the indictment on the ground that the provisions of Title 41, United States Code, Sections 51-54 are unconstitutional and thus a trial and conviction under these provisions would deny him his rights under the Fifth and Fourteenth Amendments to the United States Constitution (RA. 1a, 2a) The appellant's motion to dismiss the indictment was denied (RA. 2a) and the appellant was subsequently convicted of the charge in the United States District Court for the District of Massachusetts and was sentenced to imprisonment for four months and to pay a fine of $2,500 (RA. 3a). The appellant seasonably filed his notice of appeal (RA. 3a). Pending this appeal the appellant is not presently confined and he remains free upon his personal recognizance.

Reasons For Granting The Writ

1. The decision of the Court of Appeals on the issue of the applicability of §51 of Title 41, United States Code, raises an issue of national importance in contracts and subcontracts on work for the federal government since it fails to acknowledge that §51 was enacted originally so as to apply and to "cost plus fixed fee" contracts and does not acknowledge the difference in application when applied to a negotiated contract.

2. The decision of the Court of Appeals sustains a conviction under an indictment which was expressly based upon §51 which contains a conclusive presumption but which the Court holds is purely civil in nature so that the grand jury relied on a civil statute in returning a criminal charge.

3. The decision of the Court of Appeals sustains a conviction based on indictment predicated in part on a conclusive presumption statute in conflict with the decisions of this Court in *Tot* v. *United States*, 319 U. S. 463 and *United States* v. *Romano*, 382 U. S. 136.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDGAR L. KELLEY
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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6687.

JOSEPH L. TRAVERS,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Edgar L. Kelley, with whom *Walter J. Hurley* was on brief, for appellant.
John Paul Sullivan, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

June 3, 1966.

COFFIN, *Circuit Judge*. Defendant was indicted and convicted for having paid, as an officer of a subcontractor, a fee or gratuity to a purchasing agent of a prime contractor as an inducement for, or acknowledgement of, subcontract awards on work for the federal government. The relevant statute is the Anti-Kickback Act, 41 U.S.C. § 51-54.[1]

[1] The Act, as it relates to this case, may be broadly summarized as follows:
Section 51 prohibits payment of any gratuity on behalf of a subcontractor to an agent of a contractor "holding a negotiated contract" with a United States agency. It prohibits including such a gratuity in the subcontractor's price and sets forth remedies of setoff, court

Defendant's sole contention is that Section 51 "is on its face unconstitutional in that it purports to create a federal crime predicated upon an irrebuttable presumption [of loss to the government], with no rational connection in common experience between the fact proved and the ultimate fact conclusively presumed." His basic argument is that such a connection did exist under the original version of Section 51 (60 Stat. 38) as enacted in 1946, which applied only to cost-plus-a-fixed-fee or cost reimbursable contracts. Under this version, there was a logical linkage between kickbacks and inflated costs to the government. But with the substitution in 1960 (Pub. L. 86-695) of the word "negotiated" for the "cost-plus-a-fixed-fee" and "other cost reimbursable basis" language, argues defendant, there is no longer any reasonable inference that a kickback is ultimately borne by the government. *Tot* v. *United States*, 1943, 319 U.S. 463, and *United States* v. *Romano*, 1965, 382 U.S. 136, both involving rebuttable presumptions in criminal cases, are cited as authority for the supposed flaw in this case.

We do not reach the question of the validity of the conclusive presumption, because it seems clear to us that Section 51 is solely concerned with civil remedies. Section

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action, and withholding from sums otherwise due the subcontractor. It also specifies: "Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States."

Section 52 consists of definitions of terms. "Negotiated contract" is defined to mean "made without formal advertising".

Section 53 gives the General Accounting Office power to audit books of contractors and subcontractors.

Section 54 states: "Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both."

54, a criminal statute, by referring to "such prohibited payment", merely incorporates the definitions of proscribed kickbacks and no other provisions. As we have pointed out elsewhere, this crime of bribery stands by itself and does not depend on subsequent actions. Specifically, it is not necessary that the government be financially harmed. *Howard* v. *United States,* 1 Cir., 1965, 345 F.2d 126, 128, *cert. denied,* 382 U.S. 838. Not only does a reading of 41 U.S.C. 51-54 indicate a clear distinction between civil and criminal sanctions, but both legislative history and subsequent interpretation confirm such a reading.

In supplying requested comments on the proposed 1960 amendment to the House Committee on Government Operations, the Acting Deputy Attorney General recognized that the question of rational connection between the presumption and a kickback could be raised if fixed-price contracts were brought within the reach of the statute. That this question relates only to civil actions was made clear by the context of the letter, for the paragraph containing the above observation begins with this sentence: "The keystone of the civil liability created by the statute is the 'conclusive presumption' that any such payment was included in the price of the subcontract and was ultimately borne by the United States." U.S. Code Cong. & Ad. News, 86th Cong. 2d Sess., 1960, p. 3304.[2] This letter was specifically referred to in the House Report on the 1960 amendments. *Id.* at 3293.

Moreover, as long ago as 1955, the court in *United States* v. *Davio,* E.D. Mich., 1955, 136 F. Supp. 423, 429 stated: "Section 1 of the Anti-Kickback Act, which is the only section under consideration, is civil in nature . . . ."

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[2] While counsel for defendant saw fit to include the first point of the Department of Justice letter in his brief, he chose to ignore the language last quoted. Counsel for the government did not repair the defect.

The district judge was careful to avoid any reference to the presumption in his charge, which defendant's counsel commended. Defendant asserts, without any substantiation, the possibility of prejudice by reason of an improper consideration of the presumption by the grand jury. Indictments are not so easily to be impeached by conjecture.

Affirmed.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment in the United States District Court for the District of Massachusetts charged that petitioner, officer of a Massachusetts corporation, paid co-defendant Pomfret, officer of a prime contractor holding negotiated contracts with various federal agencies, the sum of $3,000 as an inducement for the award of subcontracts and as acknowledgement of subcontracts previously awarded to petitioner's company, in vio-

lation of 41 U.S.C. 51-54.* A second count charged that co-defendant Pomfret received the foregoing payments (R. 4-6). Pomfret pleaded guilty before trial (R. 2). Petitioner was found guilty after a

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* 41 U.S.C. 51 provides, in pertinent part:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is prohibited. * * * The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise going to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. * * *

41 U.S.C. 54 provides:

> Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.

trial by jury and sentenced to imprisonment for four months and to pay a fine of $2,500 (R. 4, 17). The court of appeals affirmed (Pet. App. 6-9).

Petitioner contends that the opinion of the court below sustains a conviction under an indictment expressly based upon 41 U.S.C. 51, which contains a conclusive presumption applicable only to civil cases. In fact, however, the court of appeals noted that the criminal penalty is prescribed by 41 U.S.C. 54, and it held that Section 51 is relevant only to the extent that it defines "prohibited payment" as used in Section 54. The presumption that a proscribed payment was included in the price of the subcontract and ultimately borne by the United States relates solely to the right of the United States to recover that amount in a civil suit; it does not bear upon criminal liability. Criminal liability attaches once a prohibited payment is made by a subcontractor regardless of whether official action is thereby affected, or whether the United States suffers any loss. *Howard* v. *United States*, 345 F. 2d 126 (C.A. 1). As the court of appeals observed, the charge, which petitioner's counsel commended as "excellent," made no reference to the presumption (R. 6-16). *Tot* v. *United States*, 319 U.S. 463, and *United States* v. *Romano*, 382 U.S. 136, which dealt with the constitutionality of presumptions, are inapposite since this conviction did not rest on any presumption at all.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1966.

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